

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT 31 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RALPH A. PEÑA, JR.,

Plaintiff/Appellant,

v.

DORA SCHRIRO, SERGEANT
STERMER, SERGEANT
KUYKENDALL, BLANCA OCHOA,
CORRECTIONAL OFFICER II
CHAVEZ, CAPTAIN RUNYON, and
ARIZONA DEPARTMENT OF
CORRECTIONS,

Defendants/Appellees.

2 CA-CV 2008-0039
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURTS OF PIMA AND PINAL COUNTIES

Pima County Cause No. C20064975
Pinal County Cause No. CV200701178

Honorable Leslie Miller, Judge (Pima)
Honorable Kevin D. White, Judge (Pinal)

AFFIRMED WITH DIRECTIONS

Ralph A. Peña, Jr.

Florence
In Propria Persona

Terry Goddard, Arizona Attorney General
By Paul E. Carter

Tucson
Attorneys for Defendants/Appellees

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Ralph Peña appeals from the superior court’s order declining to accept jurisdiction of his petition for special action and dismissing the case. Therein, Peña challenged findings of the appellees Arizona Department of Corrections and certain named employees (collectively, ADOC) that he had violated the rules of discipline for inmates. In this appeal, he argues the superior court erred when it sua sponte changed venue from Pima County to Pinal County and when it dismissed his action without a hearing or an order compelling ADOC to produce legible records. For the following reasons, we affirm the superior court’s order of dismissal but, because it erred in ordering the change of venue, we direct the Pima County Superior Court to reimburse Peña for the filing fee he paid in that court.

¶2 We view the facts in the light most favorable to upholding the superior court’s ruling. *See Hornbeck v. Lusk*, 217 Ariz. 581, ¶ 2, 177 P.3d 323, 324 (App. 2008). In September 2006, while Peña was an inmate at the state prison complex in Tucson, he filed a complaint for special action against ADOC. In it, he alleged generally that his due process rights had been violated by ADOC’s “mis[]use of the disciplinary system.” After ruling on several issues involving service of process, the Pima County Superior Court, sua sponte, ordered the case transferred to Pinal County in May 2007, stating Peña had “improperly

filed the action in Pima County.” At some time during the pendency of the action, Peña was transferred to the state prison complex in Florence.

¶3 After Peña was ordered to pay a filing fee again in Pinal County, he filed a document entitled, “Response to this Court’s Order of 06-06-07 for Transfer Fees and Notice that the Case was NOT Filed in the Wrong Jurisdiction.” In it, he asserted that, because the incidents alleged had taken place in Pima County, he had properly filed the action there. It appears from the record that the Pinal County Superior Court never made any ruling related to that filing. In February 2008, that court declined to accept jurisdiction of Peña’s special action and subsequently dismissed the case. This appeal followed.

SPECIAL ACTION JURISDICTION

¶4 Peña argues the trial court erred by dismissing his complaint without a hearing or without “ordering the defendants to produce disciplinary reports, incident reports, witness forms, etc., that are readable.” When a superior court declines to accept jurisdiction of a special action and, thus, “does not rule on the merits, we determine only whether the court abused its discretion in declining jurisdiction.” *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). A court’s determination whether to accept special action jurisdiction is “highly discretionary.” *Pompa v. Superior Court*, 187 Ariz. 531, 533, 931 P.2d 431, 433 (App. 1997).

¶5 The superior court declined to accept jurisdiction for the reason argued by ADOC: that “Peña ha[d] simply not carried his burden to establish any right to relief.” In

its opposition to the complaint for special action, ADOC enumerated thirteen allegations in Peña's complaint that were unsupported by evidence or argument. Although it was Peña's burden to produce the evidence necessary to support his complaint, *see* Ariz. R. P. Spec. Actions 3, bar committee note (plaintiff in special action "must always carry the burden of persuasion as to discretionary factors"), Peña contends this court should now order ADOC to produce legible copies of the documents he requested and should order the superior court to hold an evidentiary hearing.

¶6 From the time Peña filed his complaint until he filed his response to ADOC's opposition to the special action—a period of over six months—Peña neither followed the appropriate administrative avenues to obtain the materials he needed nor attempted to conduct discovery to obtain them. *See Bd. of Supervisors v. Pioneer Nat'l Trust Co. of Ariz.*, 25 Ariz. App. 46, 47, 540 P.2d 1265, 1266 (1975) (finding no prejudice in superior court's refusal to order disclosure not requested for over six months during pendency of special action proceeding); *see also Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz. 610, 616, 925 P.2d 751, 757 (App. 1996) (superior court in special action proceeding has broad discretion in discovery matters). Thus, the court did not abuse its discretion in implicitly denying Peña's request to conduct discovery and in ultimately declining to accept jurisdiction of the special action.

VENUE

¶7 Peña argues Pinal County did not have jurisdiction over the special action because “it was transferred for other than legitimate reasons.” “Appellate courts will not interfere with a venue ruling in the absence of a clear abuse of the trial court’s discretion.” *Floyd v. Superior Court*, 125 Ariz. 445, 446, 610 P.2d 79, 80 (App. 1980). Peña emphasizes that “all incidents took place in Pima County” while he was an inmate at the prison complex in Tucson. And, indeed, ADOC concedes in its answering brief that venue was proper in Pima County. *See* A.R.S. § 12-401(7), (16); Ariz. R. P. Spec. Actions 4(b). It is a long-standing rule that, “[i]f venue is brought in the proper county, a trial court may not legally change venue.” *Lakritz v. Superior Court*, 179 Ariz. 598, 599, 880 P.2d 1144, 1145 (App. 1994); *accord Cacho v. Superior Court*, 170 Ariz. 30, 32, 821 P.2d 721, 723 (1991); *Pride v. Superior Court*, 87 Ariz. 157, 161, 348 P.2d 924, 927 (1960); *Zuckernick v. Royston*, 140 Ariz. 605, 606-07, 684 P.2d 177, 178-79 (App. 1984).

¶8 Here, the Pima County Superior Court changed venue based on the erroneous finding that the action had been improperly filed here. In the absence of a motion by the defendants alleging an appropriate ground for the change despite the proper initial venue, we conclude the court erred in ordering the change on its own motion. *See* A.R.S. § 12-406; *Behrens v. O’Melia*, 206 Ariz. 309, ¶ 5, 78 P.3d 278, 279 (App. 2003).

¶9 ADOC contends Peña waived any challenge to the venue change by failing to raise it in a special action proceeding. *See Lakritz*, 179 Ariz. at 599, 880 P.2d at 1145. But

Arizona law does not *require* a party to challenge venue exclusively by special action. Rather, a special action is simply the best—and often the only—method by which a party can obtain relief from an erroneous venue ruling. *See Goff v. Superior Courts*, 2 Ariz. App. 344, 347, 409 P.2d 60, 63 (1965) (because error in changing venue not jurisdictional, appeal of issue after trial would rarely reveal prejudice warranting reversal).

¶10 Although Peña challenged the change of venue below in the “response” he filed, he did not appropriately challenge it by filing a special action in this court. Rather, Peña waited until this appeal to challenge the venue change, after the Pinal County Superior Court had already ruled on his complaint, and he has not shown he suffered prejudice that would have changed the outcome of the case. He has not presented any argument that the Pinal County Superior Court was somehow less able to adjudicate his claim fairly or that venue in Pinal County was improper. And, as discussed above, we have found that court did not abuse its discretion when it declined to accept jurisdiction of his special action. *See Walters v. First Fed. Sav. & Loan Ass’n of Phoenix*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982) (“[T]o justify reversal, . . . [a] trial error must be prejudicial to the substantial rights of the appealing party . . . [and t]he prejudicial nature of the error will not be presumed but must affirmatively appear from the record.”).

¶11 Because the erroneous change of venue did not affect the outcome of the case, we cannot find the court’s error entitles Peña to a reversal of the judgment dismissing his action. *See Goff*, 2 Ariz. App. at 347, 409 P.2d at 63 (noting constitutional prohibition

against reversal “when substantial justice has been done”). But Peña was ordered to pay an additional filing fee after the Pima County court transferred the case to Pinal County. Therefore, the Pima County Superior Court should return the fee it had previously charged Peña. *See State v. Freitag*, 212 Ariz. 269, ¶ 15, 130 P.3d 544, 547 (App. 2006) (affirming conviction while directing lower court to reimburse defendant filing fee illegally collected); *see also* A.R.S. § 12-2103(A) (appellate court can affirm judgment of lower court “and may render such judgment or order as the court below should have rendered”).

¶12 For the foregoing reasons, we affirm the judgment of dismissal but direct the Pima County Superior Court to refund Peña his \$185 filing fee.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge